

2008

Allan G. Birch, Glenn L. Birch, and James Birch v. Bernard J. Myers : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ALLAN G. BIRCH, GLENN L. BIRCH
AND JAMES BIRCH,

Plaintiffs, Respondents and
Appellants,

vs.

BERNARD J. MYERS,
Petitioner, Defendant and Appellee/Cross-
Appellant.

Appeal No. 20080395

Consolidated District Court Case No.
073901141

**REPLY BRIEF OF APPELLEE AND CROSS-APPELLANT BERNARD J.
MYERS**

Appeal from the Decision of the Honorable Robert P. Faust
Third Judicial District Court in and for Salt Lake County, State of Utah

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INTRODUCTION

Appellants Allan G. Birch, Glenn L. Birch and James Birch (collectively the “Birch Brothers”) filed their Reply Brief of the Plaintiffs/Appellants on January 22, 2009. The Birch Brothers’ sole opposition to Appellee and Cross-Appellant Bernard J. Myers’ (“Bernard”) Cross-Appeal is an unsupported assertion that Utah’s Wrongful Lien Statute was amended in 2008, thereby retroactively excluding a notice of interest from the scope of the 2007 version of Utah’s Wrongful Lien Statute.

STATEMENT OF FACTS

1. On August 15, 2007, Allan G. Birch filed a Notice of Interest in Real Property (the “Notice of Interest”) claiming an interest in that certain real property located at 3598 Blackhawk Drive, West Valley Utah (the “Blackhawk Property”) as an heir and named personal representative of Eva’s estate. (R. at 205.)

2. On August 29, 2007, Bernard, as trustee of the Trust, by and through counsel, sent a Request to Release the Notice of Interest (the “Request to Release”). (R. at 207-208.)

3. On September 26, 2007, more than 10 days after the Request to Release was sent, Bernard, filed his Petition to Nullify Wrongful Lien (the “Petition to Nullify”) and in accordance with the Utah Rules of Civil Procedure, served the Petition to Nullify upon Edward Garrett, counsel of record for Allan G. Birch. (R. at 131-141.)

4. The Petition to Nullify came before the district court for hearing on October 15, 2007 (the “Wrongful Lien Hearing”). (R. at 317.)

5. At the conclusion of the Wrongful Lien Hearing, the district court took the matter under advisement. (R. at 317.) On October 25, 2007 the district court issued a minute entry order as follows, “now being fully advised orders the petition to nullify wrongful lien is granted.” (R. at 338.)

6. On December 3, 2007, the district court entered its Findings of Fact Conclusions of Law and Order Granting Bernard J. Myers’ Petition to Nullify Wrongful Lien (the “First Lien Order”) awarding statutory damages in the amount of \$1,000.00 and attorneys fees in the amount of \$11,738.00. (R. at 391-394.)

7. Almost six months after the Wrongful Lien Hearing, on April 7, 2008, the district court entered its second Findings of Fact Conclusions of Law and Order Granting Bernard J. Myers’ Petition to Nullify Wrongful Lien reducing the award of attorneys fees to \$7,700.00 and rescinding the award of statutory damages, which award was previously entered pursuant to the First Lien Order. (R. at 676-679.)

ARGUMENT

I. UTAH CODE ANN. §38-9-2(1)(C) CODIFIED EXISTING CASE LAW AND WAS NOT INTENDED TO BE APPLIED RETROACTIVELY TO RESCIND RIGHTS PREVIOUSLY GRANTED BY THE DISTRICT COURT.

Contrary to the unsupported argument of the Birch Brothers’, the 2008 amendment to §38-9-2(1)(c) does not apply retroactively to a wrongful lien filed in 2007. Section 38-9-2(1)(c), as amended in 2008, provides:

Notwithstanding Subsections (1)(a) and (b), the provisions of this chapter applicable to the filing of a notice of interest do not apply to a notice of interest filed before May 5, 2008.

Utah Code Ann. §38-9-2(1)(c).

The Birch Brothers' assert that the above quoted provision of the Utah Code is retroactive and overturns decisions rendered in the Utah courts holding that a notice of interest is a wrongful lien. Contrary to the Birch Brothers' assertion, the amendment is not intended to be retroactive and the legislative history of the amendment conclusively establishes that §38-9-2(1)(c) (2008) was added to make it clear that a notice of interest is a wrongful lien.

First, the purpose of the 2008 legislative amendment to §38-9-1 *et seq.* (Utah's Wrongful Lien Statute) (the "2008 Amendment") was to codify existing case law by explicitly including a notice of interest within the definition of a "wrongful lien," to increase the statutory damage amount for recording a wrongful lien and to make it more distasteful to file a wrongful lien. *See* Unofficial Transcript of House Business and Labor Committee Debate on H.B. 486 attached as Exhibit A hereto. Given the legislative history of the 2008 Amendment, it is particularly specious to assert that the 2008 Amendment retroactively removes a notice of interest from the definition of a wrongful lien with respect to notices of interest filed before the effective date of the 2008 Amendment. The intent of the 2008 Amendment was to decrease the legal costs associated with nullifying wrongful liens in general and specifically notices of interest by obviating the need to demonstrate that a notice of interest falls within the definition of a wrongful lien. *Id.*

Second, Utah Code Ann. §68-3-3 (2008) provides, "No part of these revised statutes [the entire Utah Code] is retroactive, unless expressly so declared." Accordingly,

the Utah Supreme Court has repeatedly held that "[a] statute is not to be applied retroactively unless the statute expressly declares that it operates retroactively." *Goebel v. Salt Lake City Southern R. Co.*, 2004 UT 80, ¶ 39; 104 P.3d 1185; *see also Thomas v. Color Country Mgmt.*, 2004 UT 12, ¶ 31, 84 P.3d 1201.

Noticeably absent from the plain language of the 2008 Amendment is any express declaration of retroactivity, therefore the 2008 Amendment is not retroactive and the Birch Brothers' argument is in direct contravention of Utah statutory law that has been in place, unchanged, since at least 1953.

Third, the legislative history of House Bill 486 (the "Bill"), which bill embodies the 2008 Amendment, makes clear that the language of §38-9-2(1)(c) was added precisely for the purpose of making clear that the 2008 Amendment was to be prospective only. Representative Chad Bennion, who explained the Bill to the House Business and Labor Committee in place of Representative J. Gowans, the Bill's sponsor, addressed concerns from the Utah Attorney General's office that the 2008 Amendment would have retroactive effect. Representative Bennion responded by stating:

I think that would actually be a reasonable provision. That's the first we've heard about it. And there is no intent to go back and be retroactive for our additional claims, *it's to be prospective.*

Transcr. Of House Business and Labor Committee Debate of H.B. 486.

It is clear from the debates before the House Business and Labor Committee with respect to H.B. 486, that the language the Birch Brothers' rely on in claiming that the

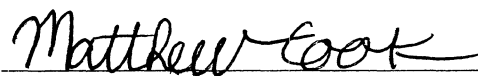
2008 Amendment is retroactive was added for the express purpose of making clear that the statute is prospective only.

Utah Courts have held, since the enactment of Utah's Wrongful Lien Statute in 1997, that a notice of interest can constitute a wrongful lien. The 2008 Amendment codified the existing case law that a notice of interest may constitute a wrongful lien. Even if the legislature's purpose were otherwise, the 2008 Amendment cannot be applied retroactively to deny rights previously granted by the district court. *See Russell v. Thomas*, 2000 UT App 82, 999 P.2d 1244; *Commercial Inv. Corp. v. Siggard*, 936 P.2d 1105, 1111 (Utah Ct. App. 1997).

CONCLUSION

For the reasons stated above, the Birch Brothers' sole argument, that the 2008 Amendment applies retroactively, fails because the legislative history of the 2008 Amendment and Utah Code Ann. §68-3-3 clearly establish that the 2008 Amendment is prospective only. The Birch Brothers do not otherwise dispute Bernard's Cross-Appeal, therefore Bernard's Cross-Appeal should be granted.

DATED this 23rd day of February, 2009.



KENT B. ALDERMAN

DAVID R. HALL

MATTHEW D. COOK

PARSONS BEHLE & LATIMER

EXHIBIT A

TRANSCRIPT OF HOUSE BUSINESS AND LABOR COMMITTEE DEBATE ON H.B. 486

HOUSE BILL 486	
	Okay, let's move to HB 486. Representative Gallons, he isn't here. Representative Hansen will sit in for him and Representative Bennion will be here with us. Once the Representative, always the Representative. Sounded like a bishop.
	I hope not.
	This Bill comes from. . .
	[inaudible]
	It might be. So anyway, I'm going to turn it over to Chad Bennion to explain the bill.
Bennion	Okay. Part of the difficulty we have in current law right now is within the definitions in the wrongful lien and wrongful lien judgments. A notice of interest that can be filed with the County Recorder and to give you an idea of what those types of filings are, here in SL County, there somewhere between 1,200 and 3,000 filings a day. State wide that number is between 2,400 and 7,000. And a notice of interest for all practical purposes for financial transactions, acts just as a lien being filed. And so, the legislation, if you take a look in the definitions, it tightens up and includes a explicit definition for the notice of interest along with the other encumbrances and a lien. Further, the bill actually with the recodification of Title 78 makes some technical changes then also increases [?] the amount. This section of the code has not been adjusted since it was first passed in 1997, dealing with wrongful liens. And again, these are primarily the definitional tightening of this section of the code. Because the hard thing with dealing with these sections and wrongful liens, is that there's no requirement right now that a [?] record interest holder in the property or the owner of the property receive any notice. The only time this comes up is when you have some type of financial transaction. So in trying to deal with these types of situations an individual can incur significant costs and attorneys fees in trying to remedy the situation. And so it's the intent with this legislation to tighten those definitions up and make it more distasteful to file a wrongful lien with the definition including the notice of interest.
	Okay, thank you. Do you have anybody else that you'd like to speak to this?
Bennion	Just a couple of comments. Several different organizations have had legal counsel look this over and their organizations have not taken position in support but there have been no concerns with the language

	because it is definitional in nature. The only exception would be possibly the administrative office of the court, but it was dealing with sections that this does not touch, that I'm aware of.
	Thank you Chad. Go to the committee for questions. I see no questions, we'll go to the audience. Anybody like to speak to this? Linda come forward.
Linda	[?] Representative Hansen, is that about not speaking to him or Representative Gallons prior to the committee meeting. But I'd just, just right before the committee meeting; I got notification from the Attorney General's office that they were concerned about certain provisions in the bill. We don't disagree with including the notice of interest within the definition of a wrongful lien. We don't have any problem with that at all. What we have concerns with is if you look at line 61 and 62, it's the retroactivity that is going to apply to a notice of interest. And we're concerned that because this would now go back to 1997, that it could potentially open the state to litigation, because of things that have happened previously. We would be much more comfortable if this provision was made effective from this date forward. And again, I apologize for Representative Hansen, but I just found out right before I walked into committee.
	Yeah. [?] with regard to it?
	Would you like to speak to that?
	I think that that would actually be a reasonable provision. That's the first we've heard about it. And there is no intent to make this go back and be retroactive for our additional claims, it's to be prospective.
	We could amend that. Is there somebody that would like. . . Representative Ferry?
Ferry	I move that on line 62 we bracket the 5, 1997 and insert 8, 2008, so it would read May 8, 2008, because that'll be the sixty, that would be the day that normal bills come, is that correct counsel? On May 5? So May 5, is the 60 day at the end of session? Okay, so that's right. Sorry. So if that's the case, we just bracket 1997 with 2008.
	Okay. Does the committee understand the amendment?
Committee	Huh, huh.
	Any questions to the amendment? Go ahead.
	I have a question on . . . does that take care of what line 63 says? Or just talks about regardless of the day, do we have to do anything with that?
	No. [?]
	I'm sorry . . .
	No, unless maybe we can refer to staff?
	Okay. Would you, can you answer that question? Come forward.

Chris Parker	[soft talking]...Chris Parker from the office of legislative research and general counsel. I believe that the only one that you need to amend to accomplish that is Subsection 1A. Although I also could be wrong.
	Does that answer the question?
	Okay thank you. Any other questions from the committee? Okay, see none. We'll go to the vote on the amendment. The amendment is to change line 62 from May 5, 1997 to May 5, 2008? All those in favor, say I?
Committee	I.
Chairman	Any opposed? Okay the bills in front of us. Is there anything else you'd like to comment on?
	Not at this time Mr. Chairman.
Chairman	Okay. I'll come back to the committee for action. Push your button will ya?
	I am on.
	Oh. I turned you on.
	I move that we pass all favorably HB 486.
Chairman	Motion has been made that we pass out favorably HB 486. Questions to the motion? None from the committee? From the sponsor?
Sponsor	I'll waive.
Chairman	From the Sponsor the motion waive. Linda? Let's go to the vote.
Linda	Representative B[?]?
Rep. B[?]	[?]
Linda	Barry for Hansen
	I.
Linda	Keiser, Ne[?], Walker, Dunnigan?
	Yes.
Linda	Steven Clark?
Steven Clark	Yes.
	Thank you committee, we appreciate that. You want to go and make a motion.
	I'll make the motion that we put HB 486 on consent.
Chairman	Motion made that we put this on consent. All those in favor say I?
Committee	I.
Chairman	Any oppose? See none.
	Thank you.
Chairman	I'll entertain another motion.
	Move to adjourn?
Chairman	Move to adjourn. All those in favor say I?
Committee	I.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2009, I caused to be served, via U.S. mail, postage prepaid, two true and correct copies of the foregoing **REPLY BRIEF OF APPELLEE AND CROSS-APPELLANT BERNARD J. MYERS** to:

EDWARD M. GARRETT
GARRET & GARRET
2091 East 1300 South, Suite 201
Salt Lake City, UT 84108

A handwritten signature in cursive script, appearing to read "A. Parker", with a long horizontal flourish extending to the right.